

In the Matter of Arbitration Between)	
)	
)	
Washington Federation of State	}	
Employees,)	
(WFSE or Union),)	
)	OPINION AND AWARD
and)	
)	G. Richardson Grievance
)	AAA Case No. 01-19-0000-8156
Washington State Criminal Justice)	
Training Commission,)	
(Agency or CJTC))	
)	
_____)	

BEFORE: David W. Stiteler, Arbitrator

APPEARANCES: For WFSE:
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Younglove & Coker
1800 Cooper Point Road SW, Bldg. 16
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For CJTC:
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HEARING LOCATION: Tacoma, Washington

HEARING DATES: December 16 & 17, 2019

RECORD CLOSED: December 17, 2019

OPINION & AWARD ISSUED: January 14, 2020

OPINION

INTRODUCTION

The Union grieved the Agency's decision to dismiss Ginger Richardson (Grievant) from her position as a program specialist. The parties were unable to resolve the matter and the Union advanced the grievance to arbitration. Through the procedures of the American Arbitration Association, they selected me as their arbitrator.

At the hearing, both parties had the full opportunity to present evidence and argue their positions. They agreed that the matter was properly before me for resolution. They further agreed that I could retain jurisdiction for 90 days following this decision to resolve remedial disputes, if any.

After presenting their evidence, the parties elected to make oral closing arguments. I closed the hearing record following their presentations.

ISSUE

The parties agreed that the issue is: did the Agency have just cause to discharge Grievant, and if not, what is the appropriate remedy?

FACT SUMMARY

The Agency operates the training academies for law enforcement and corrections officers throughout the State. The respective academies are the Basic Law Enforcement Academy (BLEA) and the Corrections Officer Academy (COA).

Because classes are not going on all the time, the Agency has few full-time employees of its own. Most of the instructors are either contract employees, who work for a set number of hours or for a particular task, or loaned employees from other state agencies, such as the Department of Corrections. These loaned employees may work full-time at the Agency but remain employees of the loaning agency.

Grievant was hired by the Agency as a program specialist 4, beginning in July 2016. Before becoming an Agency employee, she worked for the Agency as a contract

employee from 2012 to 2015, and as a loaned employee from the Department of Corrections from 2015 to 2016. The informal designation of her position was as a TAC (teacher, advisor, counselor). Her primary focus, both as a contractor and loaned employee and after she was hired by the Agency, was teaching or assisting in teaching defensive tactics.

Grievant had to complete a six-month trial service period after she was hired. Because of performance issues, the Agency extended her trial service period in December 2016. However, about a month after her trial service was extended, her then-supervisor Program Manager Bob Bragg concluded that her performance had improved enough that he ended her trial service status.

In March 2017, Grievant was put on home assignment for about a week.¹ In April, only a few weeks after she returned to the office, the Agency put her on a performance improvement plan (PIP). The plan was scheduled to last through the end of the year.

In August 2017, the Agency changed Grievant's work assignment. She had been mainly teaching defensive tactics to BLEA students. She was shifted to the COA. With the change in assignment, her supervisor changed from Bragg to Assistant Commander Ian Edwards.

Edwards talked to Grievant about his expectations for her going forward. He made it clear that her focus should be on work for the COA, not the BLEA. Grievant was not happy about the change. She preferred working with the BLEA, and thought her background was better suited for it than the COA. (She later said she felt like she had been dumped in COA because the Agency did not know what to do with her.)

¹ The reason was not part of the evidence in this matter.

About a week after the change in duties, Grievant was again put on home assignment.² That home assignment period lasted through the end of the year.

Within a few days of returning to the workplace, Grievant sent Bragg an email with her COA schedule and let him know she was available to assist with defensive tactics training for BLEA when she was not scheduled for COA activities. Bragg contacted Edwards about Grievant's offer. That prompted Edwards to meet with Grievant and remind her that he expected her to devote herself full-time to the COA.

On January 8, there was a Commander's Call meeting. Such meetings are held in the Agency's auditorium, and typically all staff and students are present. A Commander's Call may be held for different purposes, some more serious or formal, others more routine.

One such purpose is to address a law enforcement or correction officer's death in the line of duty. Meetings for that purpose generally are held first thing in the morning and are very solemn with full military-style decorum. The meeting on January 8 was held to recognize an officer who had been killed the day before.

At a Commander's Call, the students are in the front section of the auditorium with the staff in back. On certain occasions, such as a line of duty death, then-Commander Rick Bowen would invite the instructional staff to go up on stage with him. Because the January 8 meeting was organized in a hurry, Bowen did not have a chance to personally invite Grievant.

Grievant went to the Commander's Call. She was aware of the officer's death but had not heard that staff were invited to join Bowen on the stage. She entered the auditorium with some other staff members, HR Manager Sonja Peterson on one side of her and Executive Assistant Marisa O'Neill on the other. They were in the first row of

² Though witnesses and counsel alluded to the home assignment, the reason for it was not explained.

staff behind the students; there were some other staff members behind and on either side of them.

The three of them were standing, with the students standing at attention in front of them. Commander Bowen entered and made his way to the stage, followed by most of the instructors.

On seeing the instructors head to the stage with Bowen, Grievant made a gesture toward them, and said something to the effect of “I should be up there with them.”³

O’Neill was personally offended by Grievant’s actions and comment; she found them disrespectful to the fallen officer. The next day she told Edwards what she observed. She reported both Grievant’s comment and physical movement.⁴

Edwards then talked to Peterson about the incident. She also told him that Grievant said something about not knowing TAC staff were going on the stage. He recalled Peterson describing Grievant’s physical gesture as throwing her hands toward the staff accompanying Bowen to the stage.

Edwards reported to Bowen that O’Neill said Grievant had acted inappropriately during the meeting.⁵ Bowen recalled Edwards describing Grievant moving her arms around “in a very animated manner” and making an inappropriate comment about not being invited up front.

Bowen directed Edwards to set up a meeting to discuss the matter with Grievant. He wanted both to make sure she was alright and to remind her to act appropriately on such occasions.

During the meeting, Bowen felt Grievant acted defensive when questioned about her behavior. She stated that all she said was something like “oops, I should have been

³ Her specific words, the volume at which she uttered them, and the nature of her gesture are in dispute to varying degrees. The above depiction is based mainly on witness statements. To the extent necessary, those matters are addressed below in the Discussion.

⁴ It is not clear precisely how O’Neill described Grievant’s conduct to Edwards.

⁵ Bowen did not hear Grievant’s comment nor did he observe any disruption.

up there.” She denied making any gestures. Bowen told her that was not what had been reported to him, that he heard she was waving her arms around and saying she should have been invited to the front.⁶ Grievant responded to the effect that if anyone claimed she said or did something other than what she described, they were lying.

After the meeting with Grievant, based on the disparities between what Bowen had been told and what Grievant claimed, Bowen told Edwards to investigate the incident. Edwards asked O’Neill and Peterson to write statements about what they observed and heard.

In her written statement, O’Neill wrote that “[Grievant] made an audible exhale ‘harrumph’ type noise, shook her entire body so much so that she brushed my left arm, and said in what would commonly be described as a stage whisper, ‘No one told me to go up there. I should be up there with them.’” Peterson wrote that “[Grievant] scoffed and lifted her arms toward the instructors walking in and said, ‘I didn’t know they were going up there.’”

On January 19, there was a BLEA class regarding searches going on in the gym. A COA class was going on in one of the classrooms. About 10 a.m., Grievant left her office and went to the gym rather than the classroom. She did not have permission from either Edwards, or the defensive tactics program manager, or the BLEA instructor to attend the BLEA class. Though some of her time in the gym was spent observing, she did get directly involved in instructing students.

Grievant’s appearance at the BLEA course in the gym came to Edwards’ attention. He believed her actions—not participating in the COA class and instead going to a BLEA class—was contrary to his instructions to her. He decided to start an investigation on that issue as well.

⁶ When shown O’Neill’s written statement at hearing, which does not mention either Grievant swinging her arms around or swearing, Bowen acknowledged that the description in the statement was different than what he had been told before the meeting with Grievant.

Edwards interviewed Grievant. She was accompanied by a Union representative. He separated the interview into two parts, one dealing with her statements about the Commander's Call matter, the other addressing the question of whether she violated his directives about her work.

During the interview about the Commander's Call, Grievant acknowledged making a comment about messing up by not going on stage. She also said she might have made physical gesture. When Edwards reminded her that she had denied making any gestures to Bowen, she said she had minimized her actions because she was concerned about negative consequences. After a caucus with her representative, she took full responsibility for her actions and for not being forthcoming.

Edwards concluded that Grievant had been dishonest in her comments to Bowen when she denied doing anything inappropriate, and in accusing others of lying about her actions. He further concluded that she initially had been dishonest in the investigatory interview when she claimed that she had taken responsibility for her comments and actions.

During the interview about not following directives, Grievant claimed that she was just in the gym to observe, that she thought she could get information that would be useful in the COA. She acknowledged that she did interact with students, including providing instruction about proper hand placement. She admitted that she was not invited to attend the class and that she understood that she was not to get involved in teaching BLEA classes without supervisor permission. She denied that her actions were "teaching" and contended that she was only trying to improve.

Edwards concluded that Grievant had ignored his directions about focusing on the COA. He found that she had been given directives about devoting her time to the COA when classes were in session, and that going to a BLEA class and participating in instruction while a COA class was going on was a deliberate violation of those directives.

When Edwards completed his investigations into the two matters, he turned his findings over to then-Deputy Director Rex Caldwell. Up to that point, Caldwell had not been involved in the two issues with Grievant. He had not seen or heard anything himself during the Commander's Call.

Caldwell set up a pre-discipline meeting with Grievant and a Union representative. He asked her to respond to the two matters. Regarding the dishonesty issue, Caldwell recalls Grievant minimizing her actions at the Commander's Call and denying any dishonesty during the investigation interview with Edwards. Regarding the insubordination issue, he recalls her claiming that, despite being in the gym with the BLEA class, she was only looking for information that she could use in the COA.

After listening to Grievant's statement, and reviewing the information from Edwards' investigation, Caldwell concluded that Grievant was saying whatever she thought she needed to say to get out of trouble. He felt her explanation demonstrated a lack of integrity, that she knew she was in the wrong and was trying to justify her actions, particularly on the insubordination issue.

Caldwell discussed the case with Executive Director Sue Rahr, Peterson, and legal counsel.⁷ The consensus was that Grievant knew or should have known better from her training and the PIP. Caldwell thought that, given the Agency's policies, she had enough warning about the consequences of her behavior, even though she had not been disciplined previously. In his view, her efforts to minimize her conduct at the Commander's Call and claim that others misrepresented the event was a form of dishonesty.

In Rahr's view, progressive discipline would not have served a purpose because she believed Grievant's actions demonstrated a disregard for Agency policy and

⁷ There was some disparity between the testimony of Rahr, Caldwell, and Peterson about the extent of Rahr's role in the ultimate decision to discharge Grievant. As necessary, this will be addressed below.

directives. She felt that Grievant's actions were dishonest not because her descriptions of what occurred were different than others, but because of her admissions and her accusations of others.

By letter dated June 1, 2018, from Caldwell, the Agency dismissed Grievant from her position. The letter set forth three separate charges: (1) that Grievant was dishonest during a January 10 meeting with Bowen when responding to questions "about both her actions and witness accounts" regarding her actions during the January 8th Commander's Call; (2) that she was dishonest when interviewed by Edwards about her January 10th responses to Bowen; and (3) that she disobeyed supervisory directives by getting involved in the BLEA defensive tactics class after having been told she was assigned to the COA.

Caldwell's letter contained his findings on the charges. He concluded that Grievant was dishonest in her conversation with Bowen. He found that, by her own admission, she tried to downplay her actions at the Commander's Call. He further concluded that she was initially dishonest during her interview with Edwards, and only admitted her dishonesty after a caucus with her Union representative.

Regarding the insubordination charge, Caldwell concluded that Grievant's actions were a "clear violation" of the directions her supervisors gave her. Those directives expressly told Grievant that she was assigned to the COA and could only assist with BLEA activities and classes when the COA was not in session. Contrary to those directives, Grievant got involved in a BLEA class during a period when there was a COA class in session.

In explaining his decision to dismiss Grievant, Caldwell stated:
In determining the appropriate level of discipline, I considered the information available to me, including the allegations against you, your response, and your employment with the CJTC. * * * * * As a result of your dishonesty, failure to meet expectations, disregard for the directions of your supervisor, and your inappropriate

behavior in the workplace it is clear that you cannot be trusted to do your duty honestly and with the full authority of your position.⁸

The Union filed this grievance, alleging that the Agency's decision to dismiss Grievant violated Articles 2 and 27 of the parties' agreement.

Caldwell and Peterson met with Grievant and her Union representative on August 13, 2018. During that meeting, Grievant, through her representative, acknowledged dishonesty, but contended that discharge was excessive because there was no progressive discipline. She also contended that she had not disobeyed directives because the directions she received were conflicting.

Following the meeting, Caldwell sent Grievant a letter denying the grievance. He reiterated the Agency's conclusion that Grievant had been dishonest, failed to meet expectations, disregarded supervisory directives, and engaged in inappropriate behavior.

DISCUSSION

The parties' agreement provides that an employee may only be dismissed for just cause. For the reasons explained below, I conclude that the Agency had just cause when it dismissed Grievant.

Just cause is a measure of whether an employer had a good reason to impose discipline and that it acted fairly in doing so. The critical components of a just cause analysis are whether the employer proved the charged misconduct, whether the employee was given due process, and whether, all things considered, the discipline imposed was reasonable.

The Agency argues that the case is about integrity. The discharge was based on two charges of dishonesty and one of insubordination. According to the Agency's

⁸ The charges identified for investigation and which were listed as the reasons for dismissal did not include either a "failure to meet expectations" nor "inappropriate behavior in the workplace."

arguments, it met its burden of proving the charges. Grievant admitted dishonesty, and the undisputed facts prove she disobeyed Edwards' directives.

In the Agency's view, the only question for the Arbitrator is whether discharge was the appropriate penalty. Grievant admitted misrepresenting her conduct to Bowen and Edwards. The evidence also showed that she never accepted the change in duties and supervisors. As an agency that trains law enforcement and corrections officers, it is critical that employees demonstrate honesty and accept the chain of command. Though discharge is the maximum penalty, it was appropriate given the nature of the Agency's mission and Grievant's job.

The Union contends that the Agency's focus on the possible effects of Grievant's conduct outside the Agency is misplaced because she will not be subject to *Brady*. In the Union's view, the Agency's investigation was flawed because it was based on a faulty premise—that Grievant had flailed her arms and cursed—and that there was no evidence that there was an outburst or disruption. Even though there was no evidence to support those claims, the Agency took Grievant's "admissions," which it badgered her into, as showing dishonesty.

As to the level of discipline, the Union asserts that discharge was too harsh for Grievant's conduct. There is no evidence in the record of prior discipline and her evaluations were good. Any performance issues identified on the PIP were not serious. The flaws in the investigation, coupled with the lack of persuasive proof of dishonesty, establish that the Agency did not have just cause for dismissal.

As a preliminary matter, the parties disagree about the quantum of proof required. The Agency contends that a preponderance of evidence is all that is necessary. The Union counters that, given the nature of the charged misconduct—dishonesty—the standard should be proof by clear and convincing evidence.

The concept of quantum of proof were developed in other contexts, and I have found them generally unhelpful in labor arbitration. What matters is whether, in

considering the whole record, I am persuaded that the employer proved the charges for which it disciplined the employee. Any issue about the quantum of proof is even less useful here, where Grievant admitted the conduct named in two of the charges.

Proof of Misconduct – Insubordination

The Agency dismissed Grievant for two separate and unrelated types of misconduct—dishonesty and insubordination. Because the latter charge is more straightforward, I will address it first.

The Agency charged Grievant with insubordination for attending and participating in a BLEA class contrary to Edwards’ directives. I find that the evidence supports this charge.

In August 2017, the Agency adjusted Grievant’s job and switched her supervisor from Bragg to Edwards. After the change, Edwards met with Grievant to explain how her job would change and what his expectations of her would be. He made it clear that she should focus on work with the COA. Before the change in duties really went into effect, however, Grievant was placed on a home assignment that lasted through the end of the year.

Not long after Grievant returned to work, she sent Bragg an email with her work schedule for the COA that was in session and said that she hoped he would start using her to assist in BLEA training in the gym. When Edwards heard about the email, he met with Grievant again to discuss her duties and his expectations. He reiterated that Grievant was to devote her time to the COA when an academy was in session. and that she should clear it with him before getting involved in BLEA instruction.

About two weeks later, on a day when Edwards was out of the office, Grievant went to the gym where a BLEA class was going on rather than to the COA classroom where a class was also in session. She did not have permission from either Edwards or Bragg to attend the BLEA class. Though she later claimed she was just there to observe, she interacted with students and provided instruction.

Grievant's actions were contrary to the directives Edwards had given her. More troubling is that her actions appear to be part of a pattern of conduct of Grievant choosing to ignore instructions she did not agree with and do things her own way. She did not want to be transferred to the COA program from the beginning. Despite being recently reminded to focus on COA business, she ignored that directive, offered her services to Bragg without supervisory approval, and participated in a BLEA class while a COA class was in session.

Insubordination may be defined as an employee's failure to follow a legitimate management directive. Grievant's conduct in attending a BLEA class in the gym while a COA class was in session meets that definition. I conclude that the Agency proved this charge.

Proof of Misconduct – Dishonesty

The dishonesty charges, particularly concerning Grievant's interaction with Bowen, are more complicated to analyze. This is due at least in part to the various descriptions of what Grievant said and did during the Commander's Call, as well as to the basis for the investigation.

The Agency leveled two separate but related charges of dishonesty. The first concerned Grievant's statements during her meeting with Bowen about her conduct at the Commander's Call. That charge has three interrelated components: (1) that she was dishonest in her description of her actions by downplaying what she said and did; (2) that she was dishonest in denying specific allegations when confronted by Bowen; and (3) that she was dishonest in accusing others of lying about her conduct.

I find that the evidence, coupled with Grievant's admissions supports the first element of this charge. That is, she misrepresented her conduct in talking to Bowen.

In their meeting, Grievant repeatedly claimed that all she said was something like "oops, I made a mistake" and that she sat down quietly with other staff. In contrast, O'Neill's written statement describes Grievant making an "audible exhale," shaking her

body so much that she brushed O'Neill's arm, and stating in a "stage whisper" that "No one told me to go up there. I should be up there with them."⁹ Peterson's written statement said that Grievant "scoffed," "lifted her arms" toward the other instructors and said, "I didn't know they were going up there."

Though their written statements differ in some respects, for the most part, their descriptions of what occurred are similar. They were written near in time to the event when recollections were fresh. I find them to be credible.

The composite picture drawn from those statements establishes that Grievant's description to Bowen was, as she ultimately admitted, inaccurate. Rather than just saying she made a mistake as she claimed to him, she apparently expressed either resentment (for being excluded) or embarrassment (for not being in the right place) or some combination. In addition, she did not just sit quietly, but made a noticeable physical gesture that was witnessed by Peterson and caused her to bump into O'Neill. In short, the evidence shows she misrepresented her conduct and comments.

The difficulty in analyzing the other two elements of this charge stems from the fact that the meeting between Grievant and Bowen was based somewhat on inaccurate (at best) information. Specifically, Bowen had been told that Grievant was moving her arms in a very animated manner and making comments about not being invited to the stage.

As set forth above, however, neither O'Neill's nor Peterson's statements say anything about Grievant moving her arms as Bowen's described. That leads to one of two conclusions.¹⁰ The first is that Edwards exaggerated and/or falsified what O'Neill

⁹ O'Neill's testimonial description was more dramatic and will be discussed below.

¹⁰ I discounted the possibility that Bowen was exaggerating what he had been told. When presented at hearing with O'Neill's written statement, Bowen testified that it was not consistent with what he had been told.

told him. The second is that O'Neill exaggerated and/or falsified what she told Edwards.

In other words, either O'Neill or Edwards (or perhaps both) engaged in essentially the same conduct for which Grievant was disciplined, only in reverse. That is, while Grievant misrepresented what she said and did to minimize it, one or the other of them misrepresented Grievant's actions by exaggerating them, making them out to be worse than they were. Grievant was not the only one who was less than forthright.

The upshot is that it was not dishonest for Grievant to deny moving her arms in a "very animated manner" since there is no evidence that she did so; neither witness described her movement that way in their written statements. It was likewise not dishonest for her to accuse someone else of lying if they described her actions that way, because there is no evidence to support that description. At the same time, however, Grievant was not honest in disclaiming the type of comment attributed to her, nor was she honest in accusing others of lying about what she said.

In making these findings, I am mindful that it is often not possible to discern the absolute truth from witness testimony or statements. Though people sometimes are untruthful in testifying or in recounting events in a written statement, more often they are stating the truth as they know or remember it. Each person's recollection of an event is shaped by their experiences, emotions, and biases. It is all too common for two or more individuals, in relaying what they saw or heard during an incident, to provide significantly different versions, and yet none of them is being "dishonest."

These competing versions of the "truth" leave the arbitrator the task of reconstructing what happened by analyzing the differing statements and deciding which one—or more likely an amalgam of them—is more likely than not. This is particularly true when a witness describes an event one way in writing and a different way in hearing testimony.

For example, in her testimony, O'Neill described Grievant's conduct as an outburst. She said Grievant threw her arms up, jostling her. Asked to describe Grievant's vocalization, she used the term "stage whisper."¹¹ She believes that others heard Grievant's comment, but no one mentioned it to her.

All the witnesses who were asked described the scene in the auditorium as somber and quiet, with the students all standing at attention. If it was as quiet as indicated, it is curious that the only people who heard Grievant's utterance were the two standing on either side of her. That leads to the conclusion that, contrary to O'Neill's description, Grievant's utterance would not properly be called a stage whisper. If anyone else in that silent auditorium heard Grievant, they did not come forward nor did Edwards find them in his investigation.

Peterson's testimonial description of Grievant's was different than O'Neill's. She disputed O'Neill's claim that it was an emotional outburst or disruption, though she did find it inappropriate. She did not think it was significant enough to write up, however. And she did not think anyone other than O'Neill noticed.

Some of these differences in recollection may have resulted from the stress of the moment. In addition, Grievant did downplay what happened when Bowen confronted her, and later when Edwards interviewed her, because she was worried about getting in trouble.

In sum, the evidence with respect to the first dishonesty charge establishes that, as charged, Grievant misrepresented her conduct at the Commander's Call when questioned by Bowen. In addition, she was not forthright in denying the comments attributed to her, or in accusing others of lying about her comments.

¹¹ A stage whisper is usually defined as a faux whisper made by an actor on stage and intended to be heard by the audience.

The second dishonesty charge concerns Grievant's depiction to Edwards of her responses to Bowen in their meeting. Unlike the foregoing matter, this charge is more clear-cut.

Edwards met with Grievant and her Union representative. He explained what he was investigating. He asked her to explain her actions at the Commander's Call and what she told Bowen about that conduct.

The explanation she offered about her conduct at the Commander's call differed from what she had told Bowen. For example, she acknowledged that she made some gesture, but did not remember what it was. In her meeting with Bowen, she denied doing anything but sitting quietly and saying something about making a mistake.

The explanation she offered about what she told Bowen also differed from what the notes of that meeting show. For example, she said she told Bowen that she had made a gesture and comment and that she had taken full responsibility. In fact, the meeting notes show she insisted that she did nothing but make a simple comment and that anyone who said otherwise was lying.

Toward the end of the interview, Grievant caucused with her Union representative. When she returned, her story varied yet again as she essentially admitted that she had been dishonest with Bowen and earlier in the interview, saying she did so out of fear.¹²

In sum, the investigatory notes persuade me that, in responding to Edwards' questions, Grievant again misrepresented her conduct, in both her descriptions of what occurred during the Commander's Call and what she told Bowen about her conduct. I conclude that this portion of the charge was also proven.

¹² I note that the record shows that in her *Loudermill* meeting with Caldwell, Grievant admitted that she had been deceptive by trying to minimize her behavior and that it was a form of dishonesty. The record also shows that in the step 2 grievance meeting, Grievant, through her Union representative, "accepted the charge of dishonesty," though contested that discharge was appropriate.

Due Process – Investigation

Beyond claiming a failure of proof, the Union also argued that the investigation was unfair. That claim was at least partly because the investigation was started based on an inaccurate description of Grievant's conduct.

I agree that the investigation was poorly structured. Since Grievant was accused of violating Edwards' directives, and since he was the one who gathered the statements from O'Neill and Peterson and relayed their statements to Bowen, it would have been more appropriate to have someone else conduct the investigation. Moreover, it is apparent from reading the interview notes that Edwards did not adequately make it clear to Grievant that his purpose was not to investigate her behavior, but rather to investigate her description of that behavior. For an Agency whose function is to instruct law enforcement officers in how to do business, one would have expected a more professional effort.

That said, I do not agree that the flaws in the investigation harmed Grievant. First, the investigation was started not just for alleged dishonesty issues, but also for insubordination. Second, although the investigation may have begun based on misinformation, it nonetheless produced evidence that Grievant did, as alleged, engage in misrepresentation, as well as inaccurate denials and improper accusations.

The Union also raised questions about who actually made the decision to discharge Grievant. Caldwell was the appointing authority and signed the dismissal letter. Both he and Rahr testified that the penalty decision was debated and eventually agreed on between the two of them and Peterson. Under vigorous cross-examination by the Union, however, they both gave vague and evasive answers about what disciplinary alternatives were considered and who made the final call on dismissal.

Peterson, called as a witness by the Union, testified that she and Caldwell believed that a lesser sanction than dismissal was appropriate, but that Rahr was insistent that Grievant be discharged.¹³

While this evidence does sow doubt about who actually made the decision, it does not matter in the end. The Agency charged Grievant with two counts of dishonesty and one of insubordination. The evidence substantiated those charges for whoever made the decision.

Reasonableness of Penalty

The Agency contends that, given its purpose, it cannot tolerate less than honest behavior from its employees. As a result, discharge is the only appropriate penalty even though there was no progressive discipline. In response, the Union argues that the absence of prior discipline coupled with Grievant's good evaluations require a less severe penalty, if any, given the lack of persuasive evidence of dishonesty.

There are various factors to consider in determining whether a given discipline is consistent with just cause. Among them are the nature of the proven misconduct in the context of the employee's job, the quality of the employee's service, the employee's prior disciplinary record, and the employee's length of service. On the whole, these factors do not support a reduction in discipline here.

Grievant was a teacher in an agency that instructs law enforcement and corrections officers how to behave, among other things. An important part of her role was to model behavior the Agency is trying to instill in the students. Those attributes include honesty and respect for the chain of command. Grievant's conduct was contrary to that role.

¹³ At some point after Grievant was dismissed, the Agency also dismissed Peterson.

The Union correctly points out that Grievant had not been disciplined previously, a factor in her favor. It is not correct, however, that her tenure was not without issues.

Her trial service period was extended. Not long after her trial service ended, performance issues led to her being placed on a PIP; that lasted basically to the events for which she was dismissed.

In addition, Grievant was on home assignment for an extended period of time during the PIP. Whatever the reason for it, she was out of the workplace for about four months, and it was her second home assignment. That means that, except for a short time, she was on trial service, a PIP, and a home assignment for most of her brief career.

Finally, though Grievant had been associated with the Agency for a few years before being hired, she had only been an employee for about a year and half before the incidents that led to the dismissal. That short time as an employee, especially in light of the ongoing performance concerns, does not favor mitigation.

Conclusion

The Agency charged Grievant with dishonesty and insubordination. The evidence established that she was deceptive and misrepresented her words and actions in a discussion with Bowen, and that she at least initially misrepresented what she told Bowen when interviewed by Edwards. The evidence also established that, contrary to specific instructions, she absented herself from an ongoing COA class to attend a BLEA class in the gym.

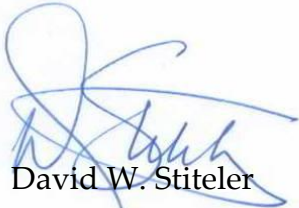
The Agency provided Grievant the necessary due process. Grievant had notice of the charges, they were investigated, and substantiated the allegations in the charges. Any defects in the interview process did not prejudice Grievant because she admitted much of the misconduct and because other critical facts were undisputed. Under the circumstances here, I conclude that dismissal was a reasonable penalty, and the Agency had just cause to dismiss Grievant. I will issue an Award denying the grievance.

AWARD

Having considered the whole record and for the reasons explained in the Discussion, I enter the following Award:

1. The Agency had just cause to dismiss Grievant.
2. The grievance is denied and dismissed.
3. The parties shall have equal responsibility for my fees and expenses.

Respectfully issued this 14th day of January 2020.



David W. Stiteler
Arbitrator